

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIMBERLY D.,

Plaintiff,

Case No. C19-728-MLP

V.

ORDER

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

I. INTRODUCTION

Plaintiff seeks review of the denial of her application for Disability Insurance Benefits.

Plaintiff contends the administrative law judge (“ALJ”) erred by finding at step four that she could perform her past work and by discounting her subjective statements. (Dkt. # 10 at 1.) As discussed below, the Court REVERSES the Commissioner’s final decision and REMANDS the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

II. BACKGROUND

Plaintiff was born in 1961, has a high school diploma, and has worked as an electronics factory assembler and operator. AR at 185, 193, 211. Plaintiff was last gainfully employed in 2014. *Id.* at 193, 211.

1 In October 2015, Plaintiff applied for benefits, alleging disability as of November 7,
2 2014. AR at 164-65. Plaintiff's application was denied initially and on reconsideration, and
3 Plaintiff requested a hearing. *Id.* at 91-97, 99-105. After the ALJ conducted a hearing on
4 September 27, 2017 (*id.* at 32-65), the ALJ issued a decision finding Plaintiff not disabled. *Id.* at
5 15-27.

6 Utilizing the five-step disability evaluation process,¹ the ALJ found:

7 Step one: Plaintiff has not engaged in substantial gainful activity since the alleged onset
date.

8 Step two: Plaintiff's degenerative disc disease and chronic pain are severe impairments.

9 Step three: These impairments do not meet or equal the requirements of a listed
10 impairment.²

11 Residual Functional Capacity: Plaintiff can perform light work with additional
12 limitations: she can lift/carry up to 20 pounds occasionally and up to 10 pounds
13 frequently. She must work in a job where some of the work is performed at a workstation
14 or desk, but the job also includes some duties that would involve getting up to go get
15 tools or files or give something to someone so that she could limit her standing/walking
16 to approximately four hours and could sit for approximately six hours out of an eight-
hour work day (with normal breaks). She can occasionally climb ramps or stairs, balance,
stoop, kneel, and crouch. She can never climb ladders, ropes, or scaffolds, or crawl. She
can frequently reach overhead. She must avoid concentrated exposure to excessive
vibration and workplace hazards such as working with dangerous machinery and at
unprotected heights.

17 Step four: Plaintiff can perform past relevant work, and is therefore not disabled.

18 AR at 15-27.

19 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
20 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
21 Commissioner to this Court. (Dkt. # 10.)

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23¹ 20 C.F.R. § 404.1520.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

III. LEGAL STANDARDS

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to "the record as a whole to determine whether the error alters the outcome of the case." *Id.*

“Substantial evidence” is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

IV. DISCUSSION

A. The ALJ Erred at Step Four

At step four, the ALJ found that Plaintiff could perform her past work as an electronics inspector as generally and actually performed, as well as her work as an electronics assembler as actually performed. AR at 26-27. The Commissioner concedes that the ALJ erred in finding that Plaintiff could perform the job of electronics assembler, and argues that this error is harmless if

1 the ALJ did not err in finding that Plaintiff could perform her past work as an electronics
2 inspector. (Dkt. # 11 at 7.) For the following reasons, the Court finds that the ALJ did err in
3 finding that Plaintiff could perform her past work as an electronics inspector because the ALJ
4 failed to make any findings supported by substantial evidence establishing that this job meets the
5 regulatory definition of past relevant work.

6 1. *Legal Standards*

7 Plaintiff bears the burden at step four of demonstrating that she can no longer perform her
8 past relevant work. 20 C.F.R. §§ 404.1512(a), 404.1520(f); *Barnhart v. Thomas*, 540 U.S. 20, 25
9 (2003). Past relevant work is work generally (1) performed within the past fifteen years, (2)
10 constituting SGA, and (3) lasting long enough for the individual to have learned how to perform
11 the work. *See* 20 C.F.R. §§ 404.1560(b)(1), 404.1565(a).

12 2. *Recency*

13 Plaintiff argues that the ALJ erred in considering her prior job as an electronics inspector
14 as “past relevant work” because it was not performed within 15 years of the ALJ’s decision.
15 (Dkt. # 10 at 5-6.) The ALJ’s written decision finds that Plaintiff performed the electronics
16 inspector job from 2001 through 2014, but the Commissioner acknowledges that she actually
17 performed this job from 1994 to 2001. (Dkt. # 11 at 6.) The Commissioner contends that
18 Plaintiff’s hearing testimony about similarities between the job she performed in 1994-2001 and
19 the other jobs she performed more recently for the same corporation indicate that there was a
20 “continuity of skills, knowledge, and processes” between the electronics inspector job and her
21 more recent jobs, which were recent enough to constitute past relevant work. (*Id.* (quoting Social
22 Security Ruling 82-62, 1982 WL 31386 at *2 (Jan. 1, 1982))).

1 It is possible that Plaintiff's past jobs contain such a continuity that her electronics
2 inspector job could be found to meet the regulatory definition of past relevant work, but the
3 ALJ's decision contains no such finding and instead erroneously indicates that Plaintiff worked
4 as an electronics inspector from 2001-2014, and thus does not address the recency issue at all.
5 AR at 26. Remand is necessary for the ALJ to consider the recency question in the first instance.

6 **B. The ALJ Erred in Discounting Plaintiff's Subjective Testimony**

7 The ALJ discounted Plaintiff's testimony because her activities were inconsistent with
8 her allegations, and because the medical evidence did not corroborate Plaintiff's allegation of
9 disability. AR at 24-25. Plaintiff argues that the ALJ's reasons were not clear and convincing, as
10 required in the Ninth Circuit. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

11 Plaintiff contends that in finding her activities to be inconsistent with her allegations, the
12 ALJ did not explain how any of the cited activities actually contradicted any particular
13 allegation. (Dkt. # 12 at 7.) That is generally true of the ALJ's findings, because most of the
14 activities described by the ALJ are not inherently inconsistent with the evidence cited by the
15 ALJ, with two exceptions: Plaintiff's use of an assistive device when walking, and her allegation
16 of decreased strength. AR at 25-26. The ALJ noted that Plaintiff testified she required the use of
17 an assistive device when walking (*id.* at 24), and the ALJ found that testimony to be inconsistent
18 with the record, but most of the evidence cited by the ALJ corroborates rather than contradicts
19 that testimony. *Id.* at 25 (citing *id.* at 368-81, 387-98, 399-402, 406, 429-39, 444-530). The ALJ
20 also noted that Plaintiff testified that she experienced decreased strength (*id.* at 24 (referencing
21 *id.* at 47)), but cited records showing full extremity strength upon examination. *Id.* at 25 (citing
22 *id.* at 368-81, 387-98, 399-402, 406, 429-39, 444-530). Plaintiff testified that her back problems
23 caused weakness down the left side of her leg when sitting or walking (*id.* at 46), and this type of

1 weakness would not necessarily be measured by testing extremity strength in isolation; the ALJ
2 did not cite substantial evidence contradicting Plaintiff's testimony of weakness when walking or
3 sitting. Thus, the ALJ's findings regarding activities do not demonstrate inconsistencies between
4 Plaintiff's allegations and activities, and thus do not constitute a clear and convincing reason to
5 discount Plaintiff's testimony. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities
6 may undermine credibility where they (1) contradict the claimant's testimony or (2) "meet the
7 threshold for transferable work skills").

8 The ALJ's remaining reason to discount Plaintiff's subjective testimony — lack of
9 corroboration in the medical evidence — is not sufficient to solely support the ALJ's
10 determination. *See, e.g., Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986) ("[I]t is improper
11 as a matter of law for an ALJ to discredit excess pain testimony solely on the ground that it is not
12 fully corroborated by objective medical findings."). Thus, because the ALJ failed to provide
13 sufficient reasons to discount Plaintiff's testimony, her testimony must be reassessed on remand.

14 **V. CONCLUSION**

15 For the foregoing reasons, the Commissioner's final decision is REVERSED and this
16 case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. §
17 405(g). On remand, the ALJ should reconsider the step-four findings, Plaintiff's testimony, and
18 any other portion of the decision as necessary.

19 Dated this 19th day of November, 2019.

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23 MICHELLE L. PETERSON
United States Magistrate Judge